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In The

Supreme Court of the United States

October Term, 1995

CITY OF BLUE SPRINGS, MISSOURI, et al.,

Petitioners,

vs.

RONALD KINCADE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

FURTHER REASONS FOR GRANTING THE WRIT... 1

I. INTRODUCTION 1

II. ARGUMENT 2

A. Respondent Acknowledges That The Circuits Are In Conflict On This Important Issue of First Amendment Law 2

B. The Various Approaches And Results Reached By Lower Courts On Facts Similar To Those Presented Here Clearly Demonstrate That Defendants Are Entitled To Qualified Immunity 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Bausworth v. Hazelwood School District, 986 F.2d 1197 (8th Cir. 1993) 4

Connick v. Myers, 461 U.S. 138 (1983) 2, 3, 5, 6, 7

Coughlin v. Lee, 946 F.2d 1152 (5th Cir. 1991) 4

Hunter v. Bryant, 502 U.S. 224 (1991) 7

Koch v. City of Hutchinson, 847 F.2d 1436 (10th Cir.), *cert. denied*, 488 U.S. 9009 (1988) 4

Linhart v. Glatfelter, 771 F.2d 1004 (7th Cir. 1985) 4

Morgan v. Ford, 6 F.3d 750 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2708 (1994) 3

O'Connor v. Steeves, 994 F.2d 905 (1st Cir.), *cert. denied*, 114 S. Ct. 634 (1993) 6

Pickering v. Board of Education, 391 U.S. 563 (1968) 2, 6, 7

Thomson v. Scheid, 977 F.2d 1017 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2341 (1993) 4

FURTHER REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

Respondent has adopted the Questions Presented For Review in the Petition and has conceded that "the only claimed First Amendment expression before this Court is the expression which occurred on August 5, 1991 at a closed meeting of the Board of Aldermen in Blue Springs, Missouri." (Respondent's Brief in Opposition at *i* & 1). For purposes of review by this Court, Petitioners do not contest Respondent's version of his allegedly protected speech at the BOA meeting as set forth in the Eighth Circuit's opinion and in Respondent's affidavit. (*See* App. at 4-5, n.2; Respondent's App. at 6a-7a).

In addition, the Eighth Circuit noted that Kincade's report to the BOA, constituting the allegedly protected speech, was made "in his capacity as City Engineer and pursuant to an assignment from the BOA." (App. 3). Although Respondent now contends in his Brief in Opposition that this statement is "overbroad" and "contrary to the record," the Eighth Circuit merely relied on Respondent's own statement to this effect in his pleadings. Thus, the relevant facts for review in this Court are entirely undisputed.

II. ARGUMENT

A. Respondent Acknowledges That The Circuits Are In Conflict On This Important Issue of First Amendment Law.

This Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983), addressed the circumstances in which a government employee's speech is protected under the First Amendment. Respondent concedes that the Court's decision has resulted in the courts of appeals employing "slightly different" case-by-case analyses. (Brief in Opposition at 4). In fact, the approaches are more than "slightly" different. As demonstrated in the Petition, the courts of appeals have adopted widely divergent modes of analyzing whether the speech at issue is protected.

Respondent suggests that all of the cases Petitioner relies upon to demonstrate a conflict in the circuits are consistent with *Connick* and *Pickering v. Board of Education*, 391 U.S. 563 (1968). Respondent argues that those cases cited by Petitioner which rest primarily upon a distinction between whether the employee was speaking as an "employee" or as a "citizen," and those which are based largely upon the intent of the employee in making the speech, reveal a "growing consistency" among the circuits. Respondent contends that these cases are all dependent upon a "common thread," namely a case-by-case focus on whether the employee's speech was directed at some public good or instead simply at some personal agenda. (*See* Brief in Opposition at 9-10 & nn. 5-6).

Connick and *Pickering*, however, simply did not address the situation presented by this and similar cases. Neither case involved a circumstance such as the one presented here in which Respondent was speaking in his

capacity as an employee, rather than as a citizen, on a matter of potential public concern, but only in the course of performing his official job duties. This accounts in large part for the different approaches crafted by the courts of appeals attempting to address this situation. Respondent's efforts to reconcile the appellate cases aside, the fact remains that the courts have adopted widely variant analytical approaches,[1] with some courts focusing primarily on the employee versus citizen distinction, others looking foremost to the employee's intent in speaking, and yet others relying largely on whether the content of the speech itself is likely to be a topic in which the public might be interested.[2] Clarity and guidance are needed from this Court for precisely this reason.

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[1] Contrary to Respondent's suggestion, the cases illustrating the different approaches employed by the courts of appeals cannot be viewed as consistent with one another on the basis that all of the opinions are attempting to determine whether the speech is of "public concern" or is only of "private interest." (*See* Brief in Opposition at 10). According to *Connick*, whether speech is of public concern "must be determined by the content, form, and context of a given statement, as revealed by the whole record." 461 U.S. at 147-48. It is the analysis employed to reach that ultimate conclusion on which the courts of appeals part company, with marked effect on the outcome.

[2] Respondent cites a number of cases in his Brief in Opposition at p. 9, nn. 5 & 6, which he contends are all understandable by focusing on the public concern/private interest distinction. As Petitioners demonstrated in their Petition, these cases reflect the full diversity of approaches that the courts of appeals have adopted under *Connick*. (*See* Petition at 10-15 & nn. 2-3). Moreover, several of the cases cited by Respondent plainly were not decided on the basis of speech involving a plaintiff's own personal conflicts or disputes. *See, e.g., Morgan v. Ford*, 6 F.3d 750, 754-55 & n.7. (11th Cir. 1993)

Additionally, the Tenth Circuit's opinion in *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988), and the Eighth Circuit's opinion in the present case graphically illustrate the need for further guidance from this Court on this issue. Despite Respondent's attempts to distinguish *Koch* from this case, the cases are analytically indistinguishable. Respondent agrees that the employees in both cases were responding to job-related inquiries. (Brief in Opposition at 11). Respondent nevertheless asserts that the employee's speech in *Koch* was not protected because the employee's performance was at issue, *id.*, whereas here it was not. Even were this true, this alone is not sufficient to distinguish these cases. The Tenth Circuit in *Koch* concluded "that the City's discharge of its duty to investigate fires

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(plaintiff not speaking solely on her own personal concern when speech included complaint of sexual harassment of another), *cert. denied*, 114 S. Ct. 2708 (1994); *Bausworth v. Hazelwood School District*, 986 F.2d 1197, 1199 (8th Cir. 1993) (plaintiff's speech to parent regarding school district's policy on charging for field trip transportation not of personal concern to plaintiff); *see also Coughlin v. Lee*, 946 F.2d 1152, 1157 (5th Cir. 1991) (criticism of sheriff was not matter of public concern because subject not relevant to evaluation of performance). Likewise, cases such as *Thomson v. Scheid*, turn on whether the speech involved only the plaintiff's duties as a government employee. 977 F.2d 1017, 1020-21 (6th Cir. 1992) (plaintiff's speech concerning alleged fraud of public official was not of public concern because involved only plaintiff's duties as employee), *cert. denied*, 113 S. Ct. 2341 (1993).

Similarly, the Seventh Circuit's opinion in *Linhart v. Glatfelter*, 771 F.2d 1004 (7th Cir. 1985), and a number of cases following that approach, focusing on the speaker's intent, clearly evince a different approach in whole or in part from the cases above. (*See* Petition at 12-14 & n.3).

and determine their causes could be a matter of great public concern[,]" as could Koch's competence to perform his job. 847 F.2d at 1447. Although Koch contended that his speech was motivated by a desire to inform the public of what he viewed as the defendants' misfeasance, the court concluded that neither Koch's fire investigation report nor his conclusion were "in any way motivated or inspired by such alleged improprieties [by the defendants] or by the desire to expose those improprieties." *Id.* at 1448. Rather, the report was simply a routine report performed by Koch as part of his job, *id.* at 1447, which in any event did not "sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government." *Id.* (citations omitted). The same is true in this case but the Eighth Circuit apparently overlooked some of these considerations and scarcely acknowledged others.

Respondent observes that both *Koch* and the present case "are consistent with *Connick* although reached through different analyses." (Brief in Opposition at 12). If it is accurate to say that both decisions are consistent with *Connick*, then a significant ambiguity exists in *Connick* which this Court should clarify. If that statement is not accurate, the Court should provide additional guidance to the lower courts concerning the appropriate standard to apply in cases involving employee speech in the course of performing work assignments. In either event, the Court should hasten to rescue the lower courts as well as unsuspecting governmental entities and their officers, from the quagmire created by the uncertainty as to the appropriate analytical framework for determining whether an employee's speech is protected under the First Amendment.

Citing *O'Connor v. Steeves*, 994 F.2d 905 (1st Cir.), *cert. denied*, 114 S. Ct. 634 (1993), Respondent contends that his speech regarding the safety of a residential dam must be protected speech because the content alone should reveal that the speech is a matter of public concern. At the same time, Kincade contends that Koch's speech regarding the investigation of fires properly was analyzed under the second category of speech referred to in *O'Connor*, i.e., that which is of some public concern but for which the court looks to the speaker's intent to determine First Amendment protection. There is no logical basis for drawing such a distinction between Respondent's speech and the speech in *Koch*.[3]

Respondent complains that Petitioner is attempting to have this Court "impose one analytical framework on all courts to interpret these cases." This is precisely correct. An important constitutional issue such as the one presented here should not result in the application of a host of different analytical paradigms and contrary results by the lower courts. The uncertainty created by the *Pickering-Connick ad hoc* balancing approach as it now exists makes it virtually impossible for governmental officials to predict whether an employee's speech in a given instance is protected expression or not.

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[3] Likewise, under the approach which Respondent offers here, there would be no basis for distinguishing virtually any of the cases cited in n.2, *supra*; the content of the speech in each case alone would almost certainly dictate the conclusion that the speech was protected. Those decisions, however, reached the opposite conclusion.

B. The Various Approaches And Results Reached By Lower Courts On Facts Similar To Those Presented Here Clearly Demonstrate That Defendants Are Entitled To Qualified Immunity.

The foregoing discussion and that in Petitioner's original brief demonstrate that one cannot possibly say that the law in this area was "clearly established" in any meaningful sense at the time Petitioners made the decision to terminate Respondent. *Connick* and *Pickering* do not address the situation presented in this case – an employee speaking in his capacity as an employee in response to a work assignment on a matter of potential public concern. The disparate approaches adopted by the lower courts reflect that the members of the BOA were not "plainly incompetent"; if the courts are unable to employ any uniform standard for addressing this issue, and arrive at different conclusions on remarkably similar facts, surely the elected government officials in this case should not be held personally liable for money damages for arriving at a conclusion that may later be deemed incorrect.

To deny the individual defendants qualified immunity in this case, as the Eighth Circuit did, violates this Court's instruction in *Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam). The court below did not inquire whether defendants reasonably could have concluded that Respondent's speech was not constitutionally protected under settled law. Rather, many years after the fact, the courts below determined that Respondent's speech was constitutionally protected based on changing law. This unquestionably contravenes the holding of *Hunter*, since

at the time it was made, defendants' "decision was reasonable, even if mistaken." *Id.* at 228 (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

CONCLUSION

For the reasons stated in this Reply and in the original Petition, petitioners respectfully request that the Court grant plenary review of both questions presented. In the alternative, petitioners request that the Court summarily reverse the Eighth Circuit's denial of qualified immunity to the individual petitioners on the basis of *Hunter v. Bryant*.

Respectfully submitted,

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